IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD J. FOLEY, SR.,	:	**CIVIL ACTION**
	:	
Plaintiff,	:	
	:	
v.	:	
	:	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND, et. al.,	:	
	:	
Defendants.	:	**NO. 98-906**

Reed, S.J. **April 23, 2002**

M E M O R A N D U M

Now before the Court is the motion of defendants for attorneys' fees and costs under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(g). For the reasons set forth below, the motion of defendants will be denied.

Background

The following is an edited summary of the factual background of this action previously provided in this Court's Opinion of December 7, 2000. See Foley v. IBEW Local Union 98 Pension Fund, 2000 U.S. Dist. LEXIS 17769 at **2-3 (E.D. Pa. Dec. 7, 2000) ("Foley III"). Plaintiff had brought this action under the Internal Revenue Code ("IRC"), the Labor Management Reporting and Disclosure Act of 1974, 29 U.S.C. § 401 et seq. ("LMRDA") and ERISA, alleging that he was denied 12.5 years of pension benefits he had accrued prior to a break in service in employment that was covered by the International Brotherhood of Electrical Workers Union Local 98 ("Local 98") pension plan (employment in the electrical industry). The pension fund trustees had denied plaintiff's request for eligibility under an exception to the plan's

break-in-service provision, under which plan members who meet certain criteria may receive credits accrued prior to a break in service.

This Court granted summary judgment in favor of defendants on plaintiff's claims under the IRC and the LMRDA, ruling that plaintiff's free speech rights were not violated by the union defendants and that the pension fund trustees did not improperly amend the pension plan; nevertheless, the Court denied summary judgment as to plaintiff's ERISA claims. See Foley v. IBEW Local Union 98 Pension Fund, 91 F. Supp. 2d 797 (E.D. Pa. 2000) ("Foley I"). Following a non-jury civil trial on August 21 and 22, 2000, this Court found that plaintiff was treated differently from all other persons similarly situated in that his petition for eligibility under the break-in-service exception was subjected to a more demanding evidentiary standard and a stricter level of scrutiny than the petitions of those similarly situated to him. See Foley v. IBEW Local Union 98 Pension Fund, 112 F. Supp. 2d 411 (E.D. Pa. 2000) ("Foley II"). The Court therefore concluded that the trustees' decision to deny plaintiff his accrued pension benefits was arbitrary and capricious, and that plaintiff was entitled to a recovery of benefits under ERISA, 29 U.S.C. § 1132 (a) (1) (B), and granted judgment in favor of Foley and against the pension fund in the amount of $99,624.65. See id. at 416. Upon plaintiff's further motion, the Court granted plaintiff attorneys' fees under ERISA in the amount of $122,604.49. Foley III, 2000 U.S. Dist. LEXIS 17769 at * 18.

The judgment in favor of Foley and the attorneys' fees award were subsequently reversed by the Third Circuit Court of Appeals, which determined that notwithstanding the past practice of the Trustees in treating persons similarly situated to plaintiffs, the Trustees acted in a responsible manner consistent with their obligations as fiduciaries. See Foley v. IBEW Local Union 98

Pension Fund, 271 F.3d 551, 559 (3d Cir. 2001). Defendants now seek attorneys' fees from plaintiff under ERISA.

Legal Standard

Under ERISA, a court may, in its discretion, award "reasonable" attorneys' fees to either party. See 29 U.S.C. § 1132 (g) (1).[1] While the statute itself offers no criteria to guide a court's exercise of its discretion, the Court of Appeals for the Third Circuit has used the following five-factor test for determining whether an award of fees to a prevailing party is warranted under Section 1132 (g) (1):

> (1) the offending parties' culpability or bad faith:
>
> (2) the ability of the offending parties to satisfy an award of attorneys' fees;
>
> (3) the deterrent effect of an award of attorneys' fees against the offending parties;
>
> (4) the benefit conferred on members of the pension plan as a whole; and
>
> (5) the relative merits of the parties' positions.

See Ursic v. Bethlehem Mines, 719 F.2d 670, 673 (3d Cir. 1983). According to the Third Circuit Court of Appeals, district courts must articulate their analyses and conclusions as to each of the five factors. See Anthuis v. Colt Indus. Operating Corp., 971 F.2d 999, 1012 (3d Cir. 1992).

A. Culpability or Bad Faith and the Relative Merits of the Parties' Positions

The first Ursic factor does not require a finding of bad faith or ulterior or sinister purpose. See McPherson, 33 F.3d at 256-57. A court can find against a party on the first factor when the conduct at issue involved blameable conduct that constituted "something more than simple negligence." Id. at 257. Thus, the first and fifth Ursic factors are related. Where plaintiff's claim

[1] The statute provides, "In any action under this subchapter ... by a participant ... the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132 (g) (1).

is patently without merit under the fifth factor, then the Court may find bad faith or culpability under the first.

Defendants argue that Foley's conduct in pursuing the pension benefits at issue constituted both bad faith and culpable conduct. To support their argument, they point to Foley's position as a trustee of the Fund and his decision to litigate the case after the subcommittee investigation determined that plaintiff had submitted insufficient evidence of his availability to work between 1972 and 1981.[2] They further argue that plaintiff's pursuit of the litigation over six years was meritless, and therefore constitutes culpable conduct.

Although the Third Circuit Court of Appeals concluded that the Fund did not act in an arbitrary and capricious manner with regard to plaintiff, this conclusion does not militate in favor of an award of fees. "[A] losing party is not culpable merely because it has taken a position that did not prevail in litigation." McPherson, 33 F.3d at 257. This Court found substantial evidence supporting plaintiff's position that he was treated in a different manner than those similarly situated to him. As stated in the Confidential Report by the Investigative Subcommittee of the Fund that found a lack of evidence supporting Foley's pension status,"[t]here is nothing unique as to Mr. Foley's case. Almost all of the other participants who received the benefit of the available for work-no work available exception had similarly sketchy employment information that was made available to the Trustees." Foley II, 112 F. Supp. 2d at 413. Additionally, defendants set forth no evidence showing that the Trustees ever formed a subcommittee to

[2] Defendants also argue that certain other "steps" taken by plaintiff evidence bad faith, but, with the exception of the purported (and unverified) quotation of plaintiff's counsel to the press, defendants fail to cite to any part of the record that might support the existence of these steps. Additionally, as plaintiff persuasively argues, neither the refusal of plaintiff to sign the affidavit in support of the factual assertions submitted in his deposition, nor counsel's statement to the press after judgment was rendered, constitute proof of bad faith.

investigate any other plan participant's pension application or required a person to produce additional evidence of their availability for work under the break-in-service exception, as the Plan had required from plaintiff. See id. Where courts have awarded fees and expenses to prevailing defendants, the lack of any merit to the plaintiffs' arguments was clear. See Monkelis v. Mobay Chem., 827 F.2d 935, 936-37 (3d Cir. 1987) (awarding fees where claim was time-barred, plaintiff set forth no factors to support claim of termination to prevent pension from vesting, plaintiff had five more years before pension vested, and facts of case were previously litigated in wrongful discharge action in state court); Tobin v. General Elec. Co., C.A. No. 95-4003, 1998 U.S. Dist. LEXIS 693 at ** 8-9 (E.D. Pa. Jan. 26, 1998) (denying motion for reconsideration) (awarding partial fees where plaintiff maintained claim against individual CEO of company despite uncovering no supporting evidence during discovery). By contrast, where the dispute is rooted in different but reasonable interpretations of undisputed facts, a claim is not so groundless as to support an inference of culpability. See Tobin v. General Elec. Co., C.A. No. 95-4003, 1996 U.S. Dist. LEXIS 18645 at **6-7 (E.D. Pa. Dec. 11, 1996) (denying partial fees where validity of plaintiff's claim depended on interpretation of plan provision). I find that plaintiff's pursuit of his ERISA claim in the instant action, although ultimately rejected, was with facial merit and did not constitute bad faith or culpable conduct.

Although defendants argue that they should at least be awarded attorneys' fees for the unsuccessful claims brought by plaintiff under the IRC and the LMRDA, these claims involved a common core of facts as, and were based on legal theories related to, plaintiff's ERISA claim. Thus, any fee breakdown on a claim-by-claim basis would be extraordinarily difficult, and defendants have not attempted to do so. Cf. Hensley v. Eckerhart, 461 U.S. 424, 436, 103 S. Ct.

1933, 761 L. Ed. 2d 40 (1983) (fee awards to prevailing plaintiffs should not be reduced because of unsuccessful claims unless such claims were distinct, based on different facts and legal theories). Accordingly, because the Court finds that the IRC and LMRDA claims were related to plaintiff's ERISA claim, the Court is not persuaded by defendants' arguments.

B. Ability to Pay

A plaintiff's inability to pay an award of attorneys' fees by itself may be a sufficient basis to deny a motion by a prevailing defendant for fees. See Tobin, 1996 U.S. Dist. LEXIS 18645 at *11 (citing Marquadt v. North Am. Car Corp., 652 F.2d 715, 718-19 (7th Cir. 1981)). Although plaintiff has attached no supporting affidavit reflecting his financial status, plaintiff argues that he cannot afford the fees requested. The record reflects that plaintiff retired in 1996 and receives $1,387.43 in accumulated monthly pension benefits. Foley II, 112 F. Supp. 2d at 412, 416. Although defendants have asked for discovery to determine whether plaintiff would be able to pay the attorneys' fees, there is no indication that plaintiff would be likely to afford the $420, 777.00 requested. Any further discovery would only increase the amount of attorneys' fees for defendants, and is unlikely to uncover an unexpected source of income for the plaintiff. I find that it is likely that plaintiff would not have the funds to pay the attorneys' fees at issue. In view of the weight of the other factors in favor of plaintiff, further inquiry on this subject is unwarranted.

C. Deterrent Effect

An award of attorneys' fees in this case would have a detrimental, not a beneficial, deterrent effect. As explained above, plaintiff's claim that the Fund treated him differently than it treated others similarly situated was not speculative nor meritless. Deterring those with

reasonable claims from litigating their actions would not further the goals of ERISA. Therefore, I conclude that this factor weighs in plaintiff's favor.

D. Benefit to Plan Members

An award of attorneys' fees in this case will not benefit other plan members or any issue of policy. Thus, this factor does not weigh in defendants' favor.

Conclusion

My consideration of the five factors reveals that the first, second, third, and fifth factors support the denial of the motion by defendants for attorneys' fees and costs, and consideration of the fourth factor does not benefit defendants. Therefore, having made the foregoing findings and conclusions, the Court exercises its discretion herewith and the defendants' request for attorney's fees and costs under § 1132 (g) (1) will be denied.

An appropriate Order follows.

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Defendants.	:	**NO. 98-906**

O R D E R

AND NOW this 23rd day of April, 2002, upon consideration of the motion of defendants for allowance of attorneys' fees and costs under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, et seq. ("ERISA") (Doc. No. 91), plaintiff's response (Doc. No. 92), and the reply thereto (Doc. No. 93), and having concluded, for the reasons stated in the foregoing memorandum, that the record supports the exercise of this Court's discretion against defendants; the defendants are thus not entitled to attorneys' fees or costs under ERISA therefore, **IT IS HEREBY ORDERED** that the motion of defendants is **DENIED**.

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LOWELL A. REED, JR., S.J.